Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EUGENE OLIVER SWAN, JR.,

Petitioner

v.

UNITED STATES OF AMERICA
and LINDA YOUNG MILLER, PH.D.

On Petition For Writ of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In Farmer v. Brennan, 511 U.S. 825, 847 (1994), the Court held that prison officials may be liable under the Eighth Amendment for a breach of the "duty . . . to protect prisoners from violence at the hands of other prisoners" if (1) the official knows that an inmate faces a substantial risk of serious harm and (2) disregards that risk by failing to take reasonable measures to abate it. In this case, the court of appeals held that respondent, a federal officer and prison mental health care provider, was entitled to qualified immunity for her failure to protect petitioner based upon the petitioner's mental health diagnoses and the "aura of confidentiality" surrounding the communication wherein petitioner asked for help. The court of appeals also held that no negligence claim could be maintained on the same grounds.

The questions presented are the following:

1. What is the scope of a federal officer's duty to protect a prisoner from violence at the hands of another prisoner under Farmer v. Brennan when the officer serves in a dual capacity of "federal officer" and "prison mental health care provider."

2. To what extent is state law applicable in an action under the Federal Tort Claims Act to recover for injuries sustained by a federal prisoner caused by negligent acts of a federal officer.

PARTIES TO THE PROCEEDING BELOW

The Petitioner is Eugene Oliver Swan, Jr. , a former federal prison inmate.

Respondents are the United States of America and Linda Young-Miller, Ph.D., a federal correctional officer at FCI, Dublin, California.

CORPORATE DISCLOSURE STATEMENT

The petition herein is not filed by or on behalf of a non-governmental corporation.

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OPINIONS BELOW

The decision of the court of appeals is not reported. (Appendix to Writ of Certiorari "App. A", 1a - 4a). The decision of the district court is not reported. (Appendix to Writ of Certiorari "App. B", 4a - 22a).

JURISDICTION

The judgment of the court of appeals was entered March 4, 2002. The time for filing a petition for writ of certiorari is up to and including June 2, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment VIII of the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONST. amend. VIII.

2. The Federal Tort Claims Act provides, in pertinent part:

"Subject to the provisions of chapter 171 of this title [28 USCS §§ 2674 et seq.], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USCS § 1346(b)(1).

STATEMENT OF THE CASE

1. Facts:

On December 24, 1998, petitioner Eugene Oliver Swan's left eye was split open in a violent attack and beating by an inmate at the Federal Correctional Institution in Dublin, California. (App. A, 2a). As a result of the attack, his left eye was surgically removed. (App. A, 2a).

In the weeks prior to the attack, Mr. Swan was threatened by the attacking inmate and his known cohorts. He perceived the threat as very real and was terrified for his life. Mr. Swan went to respondent, Federal Officer Linda Young-Miller, and asked her for help. Respondent ignored Mr. Swan.

Eugene Swan was formerly an inmate at FCI Dublin, California.[1] There, he participated in counseling sessions with respondent, a prison official serving in the dual capacity of "federal officer" and "staff psychologist" at FCI, Dublin. (App. B, 5a). Mr. Swan developed what he described as an open and honest relationship with respondent. (App. B, 6a).

Also incarcerated at FCI, Dublin, during the same time period as Mr. Swan, were inmates Raymond Chow and Louis Torres. (Excerpts of the Deposition of Eugene Oliver Swan "App. C", 23a, 24a). Mr. Torres had been at FCI Dublin for approximately five years and Mr. Chow for

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[1] Eugene Swan served his sentence and was released in 2002.

two to three years. Id. These inmates, along with a few others who had been incarcerated at FCI for several years "hung out together" and "had a power structure in the institution because they had been there that long." (App. C, 24a). They were the "shot callers" at FCI, Dublin, in that they dictated to the other inmates what was appropriate or inappropriate and quickly put an inmate who challenged this structure "in his place." Id. Raymond Chow was connected with a Chinese gang in San Francisco and Mr. Swan was told by different inmates that Chow was the leader of this "particularly vicious gang." (App. C, 24a, 25a).

In late November of 1998, inmate Raymond Chow threatened Mr. Swan that if Mr. Swan went against their [Chow and Torres'] authority, he was going to have problems. (App. C, 25a). Along with these statements, inmate Chow gestured to Mr. Swan by rotating his hips forward indicating a threat of sexual abuse. Id.

Thereafter, inmate Chow approached Mr. Swan and demanded that his [Chow's] cellmate move into Mr. Swan's cell. (App. B, 6a; App. C, 25a, 26a). Mr. Swan told inmate Chow that he did not want a cellmate. (App. B, 6a; App. C, 26a). Inmate Chow threatened Mr. Swan, telling him that he "had better take this guy out of [Chow's] cell, because if [he] didn't, [Swan] would be disrespecting him." Id. Mr. Swan was afraid of suffering physical or sexual abuse at the hands of Chow and other inmates. (App. C, 26a; Excerpts of the Deposition of Linda Young-Miller "App. D", 28a). To escape the imminent physical danger, he enlisted the assistance of a large friend to "back down" the threatening inmates. (App. D, 30a).

At that point, on December 3, 1998, Mr. Swan asked to see respondent "immediately". (App. D, 29a, 30a). He told respondent a group of inmates, including inmate Chow, intimidated and threatened him and he was fearful he would be physically or sexually abused by

inmate Chow and other inmates. (App. C, 26a, 27a; App. D, 28a, 30a, 31a). He also told respondent he had to seek assistance from another inmate to "back down" the threatening inmates from a physical confrontation. (App. D, 30a. 31a).

On December 3, 1998, respondent recognized that the group of inmates who were trying to intimidate Mr. Swan might hurt him. Id. She asked Mr. Swan if he wanted her to do something. (App. B, 71; App. C, 27a). Mr. Swan's response was "I just need help." Id. (Emphasis added).[2]

The administration of FCI, Dublin has various options available that, if implemented, serve to protect an inmate from threats of violence. (App A, 7a; App. D, 29a). These options include placing the threatened inmate in protective custody, transferring the threatened inmate to a different unit within the institution or to a different institution and place the alleged perpetrator in custody. Id. Prison officials also have access to information related to a particular inmate's propensity for violence or history of violent behavior. (App. D, 28a, 29a).

Respondent, however, did not seek information regarding inmate Chow, or the other inmates, to ascertain whether they had a propensity for violence or were otherwise dangerous. (App. D, 28a, 29a). Ultimately, she deemed Swan's December 3, 1998 meeting a "counseling session" and decided to keep it "confidential." (App. B, 8a). Despite his express plea for help, respondent did not report the information provided to her by Mr. Swan, did

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2 When asked at her deposition what additional facts Mr. Swan would have had to provide for her to decide he was in physical danger, respondent stated: "if he told me he was in danger and needed my assistance." (App. D, 31a).

not inform him of the options available for his protection or otherwise initiate steps to provide protection for Mr. Swan. (App. B, 7a, 8a). In fact, despite respondent's admitted knowledge that the inmates might hurt Mr. Swan, she testified at her deposition: "once entertaining that thought, I did not feel concerned that they would." (App. B, 7a; App. D, 30a).

On Christmas Eve 1998, merely a few weeks after Mr. Swan asked respondent for help, he was attacked by Louis Torres, one of the "shot callers" who "hung out" with inmate Chow at FCI, Dublin. (App. C, 23a, 24a). As a result of the attack, Eugene Swan's left eye was surgically removed.

2. District Court Opinion:

Eugene Swan brought suit under the Eighth Amendment to the United States Constitution alleging that the conduct of Federal Officer Young-Miller demonstrated deliberate indifference to Mr. Swan's safety and health and denial of his constitutional rights. Mr. Swan also sued pursuant to the Federal Tort Claims Act, alleging the federal government's liability for the negligent acts and omissions of Young-Miller that proximately caused Mr. Swan's injuries.

Respondents United States of America and Young-Miller brought a motion for summary judgment. The District Court granted respondent Young-Miller's motion for summary judgment, declaring as a matter of law, that she is protected from suit by the doctrine of qualified immunity. The District Court held that respondent Young-Miller "could have reasonably believed that her failure to take affirmative steps to protect Swan was lawful . . ." because of Swan's therapeutic history and mental health diagnoses. (App. B, 14a, 15a, 21a). In so holding, the District Court stated that Young-Miller's

"decision not to pursue protective action was motivated not by an indifference to Swan's situation, but by her desire to preserve the confidentiality of Swan's disclosures." (App. B, 16a, 17a).

The District Court also granted the United States' motion for summary judgment as to the Federal Tort Claims Act, declaring as a matter of law, that the United States of America had no duty to disclose the "confidential communications" of Mr. Swan in order to protect him because "California law has not imposed a duty on psychotherapists whereby they must violate the confidentiality of patient communications in order to protect a patient *from a third party*." (App. B, 20a, 21a, 22a).

3. Court of Appeals Opinion:

The Court of Appeals affirmed the District Court's order. (App. A, 2a). The Court of Appeals stated that although respondent Young-Miller conceded the potential harm to Swan, "she had grounds to believe that Swan was not in danger . . . [because] she was treating Swan for symptoms of psychosis and depression, she had diagnosed him as paranoid, and had learned of his history of physical abuse and prior sexual abuse and intimidation." (App. A, 3a). The Court of Appeals went on to hold that "[g]iven these diagnoses, Young Miller reasonably concluded that the confrontation with the other inmates did not pose an actual risk. . ." (App. A, 3a). Finally, the Court of Appeals stated that "given the general aura of confidentiality surrounding this situation, that Young-Miller respected Swan's wishes does not evince 'deliberate

indifference."[3] (App. A, 3a).

In a brief discussion of The Federal Tort Claims Act consisting of three sentences, the Court of Appeals also held that petitioner could not maintain a negligence claim, holding that "[f]or the reasons discussed above, Young Miller breached no duty to her patient." (App. A, 3a, 4a). In so holding, the Court of Appeals applied the "deliberate indifference" test (established by this Court to determine if an Eighth Amendment constitutional violation occurred) to a Federal Tort Claims Act negligence cause of action. The Court of Appeals erroneously refused to undertake any application of state law negligence principles to respondent Young-Miller's conduct.

REASONS TO GRANT THE PETITION

I. QUESTION PRESENTED NO. 1

This case presents an important question regarding the scope of a federal officer's duty to protect a prisoner from violence at the hands of another prisoner under Farmer v. Brennan when the officer serves in a dual capacity of "federal officer" and "prison mental health care provider." In this case, the Court of Appeals' holding effectively renders a federal officer serving in this dual capacity immune from a constitutional "deliberate indifference" violation, fatally ignoring the dynamics of the psychotherapist-patient relationship within the confines of a prison environment.

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[3] The Court of Appeals cites facts presented below by the government that, in a regularly scheduled therapy session that occurred almost one week after petitioner requested protection, petitioner self-diagnosed himself as "paranoid" and displayed concern that respondent did not tell any anyone. (App. 3a).

This question has not been addressed by this Court or any circuit court, excepting the unpublished decision below, and should be finally resolved by this Court . Final resolution by this Court will clearly delineate the role of a federal officer to protect inmates when the officer is a mental health care provider in the prison environment.

Clearly delineating the federal officer's role in this context will serve as future guiding authority for prison officials and prisoner's alike: (1) Prison officials who concurrently act as "federal officers" and prison "mental health care providers" will know that an assertion of confidentiality in a communication or the intimate knowledge of a particular prisoner's mental health diagnoses neither dispels their duty to protect an inmate from harm, nor protects them from a constitutional "deliberate indifference" violation under Farmer. (2) A prisoner will know that a request for protection will be taken seriously, regardless of the officer's position and role in the prison.

Accordingly, petitioner requests that this Court declare that every federal officer, regardless of the particular title describing that officer's role and function at the prison and regardless of whether the request for protection was conveyed in the course of a patient-psychotherapist communication, has a duty to protect an inmate from violence at the hands of other prisoners.

The petitioner herein further requests that this Court consider this issue now and declare that the Court, in Farmer v. Brennan, did not contemplate a "mental health care provider" exception to the duty to protect. Otherwise, while waiting for the courts below to fetter through this issue in the years that follow, every prisoner remains ignorant, as petitioner was in this case, that a request for protection should *not* be directed to a mental health care provider.

The facts and law applied in the proceedings below illuminate two distinct issues implicated by a federal officer that concurrently acts as a mental health care provider in a prison:

(i) Whether there is an exception to the prison official's duty to protect prisoners from violence at the hands of other inmates on the basis of patient-psychotherapist confidentiality when the information evidencing a probable danger to the prisoner is communicated by the prisoner to a federal prison officer serving in the dual capacity of "federal officer" and "mental health care provider."

(ii) When evaluating the duty of a federal officer under the two-prong Farmer "deliberate indifference" standard, may a federal officer who concedes knowledge of risk of harm (prong 1) reasonably rely upon diagnoses of the prisoner's mental health to undermine the legitimacy of a prisoner's report that he is in danger in a correctional institution, or does the Farmer duty mandate that the officer take measures to investigate and abate the risk (prong 2) irrespective of the prisoner's diagnoses.

A. The Farmer v. Brennan Duty to Protect the Prisoner Requires a Federal Officer to Breach Patient-Psychotherapist Privilege in the Interest of Protecting the Prisoner from Harm.

All federal officers, including those acting in the dual capacity as a mental health care provider, have "a duty . . . to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan (1994) 114 S.Ct. 1970, 511 U.S. 825, 833, quoting Cortes-Quinones v.

Jimenez-Nettleship, 842 F.2d 556, 558, cert. denied, 488 U.S. 823 (1988).[4] In this case, instead of adhering to her duty as a federal officer as delineated in Farmer, respondent unilaterally deemed petitioner's request for help to be a confidential patient-psychotherapist communication, without inquiry as to whether the communication was intended to be privileged. In doing so, respondent wholly disregarded her duty as a federal officer to take action to protect Mr. Swan. She took this course, notwithstanding her recognition that Mr. Swan could be at risk of harm.

The Court of Appeals approved respondent's declaration of confidentiality, thereby declaring as a matter of law, that a patient-therapist privilege attached. Having determined that patient-psychotherapist privilege was applicable, the court found that the "aura of confidentiality" supported the absence of "deliberate indifference," thus creating an exception to the Farmer holding.

The Court of Appeals' reliance upon confidentiality as a justification supporting the absence of "deliberate indifference" is misplaced and in direct contravention to the guidance offered by this Court in Jaffe v. Redmond (1996) 518 U.S. 1.

In Jaffe, the Court recognized the existence of a

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See also 18 U.S.C. § 4042 (emphasis added): "The Bureau of Prisons, under the direction of the Attorney General, shall . . . (1) have charge of the management and regulation of all Federal penal and correctional institutions; (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States. . . (3) provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States."

federal psychotherapist-patient privilege in holding that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. Jaffe, 518 U. S. 1, 15 (emphasis added).[5] However, in so holding, the Court explicitly supported a breach of patient-psychotherapist confidentiality by observing: "We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Jaffe, supra, at 18, n. 19.

The Farmer v. Brennan duty to protect an inmate from violence at the hands of other prisoners outweighs the interest of maintaining the confidentiality of a patient-psychotherapist communication. The question is one of gravity of the harm to be prevented: protection of life and health versus preservation of the sanctity of the patient-therapist relationship to promote honesty and trust. This Court expressly approved a breach of confidentiality to protect a patient from harm. Jaffe, supra, at 18, n. 19. Yet, the Court of Appeals did not attempt to balance the competing interests and, instead, held that respecting the "aura of confidentiality" did not "evince 'deliberate indifference'". (App. A, 3a).

Effectively, the Court of Appeals rendered a federal officer immune from a "deliberate indifference" violation for failure to protect a prisoner from harm when the

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The Court made clear in Jaffe that the psychotherapist-patient privilege is not rooted in the constitutional right to privacy but, rather, is an evidentiary privilege. Jaffe at 10. Also, the Court conditioned its holding, noting that "[l]ike other testimonial privileges, the patient may of course waive protection. Jaffe 518 U.S. 1, 15, n. 14.

request is communicated during the course of a privileged conversation. According to the Court of Appeals, if an officer fails to act upon a request for protection because that officer is "respecting" confidentiality, the officer is, as a matter of law, acting reasonably. Petitioner is not persuaded that this Court intended such a derogation of the Farmer "deliberate indifference" standard.

The Court of Appeals' decision that a psychotherapist is immune to a violation of the "deliberate indifference" standard fails to address the dynamics of the psychologist-patient relationship in the prison environment. In general society, a person who feels threatened by a third person has many options. That person may seek law enforcement intervention by notifying police authorities. That person may seek court intervention by seeking a protective order. Likewise, a person in general society has the option and benefit of self-protection, whether it be through ownership of a firearm or carrying pepper spray. The individual has multiple options outside of the patient-psychotherapist relationship to seek protection.

However, in the restrictive confines of a prison environment, the inmate does not have these luxuries. The inmate must report the danger to a prison official. The inmate cannot seek outside sources of aid, such as local law enforcement or court intervention. The inmate does not have access to weapons designed for self-protection. Rather, the inmate must report threats and seek protection from prison officials.

The public interest in safety from violent assault does not end where the doors of a correctional institution begin. This Court recognizes this truism and therefore imposes a duty on prison officials to protect an inmate from harm at the hands of other inmates. Yet, despite precedent, the Court of Appeals found that respondent's duty was vitiated by her title as "staff psychologist." A

federal officer, regardless of the particular title describing that officer's role and function at the prison and regardless of whether the request for protection was conveyed in the course of a patient-psychotherapist communication, has a duty to protect an inmate from violence at the hands of other prisoners.

Applying those principles herein leads to only one sound conclusion: federal officers have a duty to breach patient-therapist confidentiality to adhere to their duty under Farmer.

Whether a prison mental health care provider is bound by the duty delineated by this Court in Farmer or whether an assertion of confidentiality eviscerates that duty as a matter of law is an important and unsettled question appropriate for this Court to finally resolve.

B. A Federal Officer May Not Rely Upon Intimate Knowledge of a Prisoner's Mental Health Diagnoses to Evaluate the Legitimacy of a Present Danger to a Prisoner.

The intimate knowledge of a particular prisoner's mental health diagnoses neither dispels a federal officer's duty to protect an inmate from harm, nor protects the federal officer from a constitutional "deliberate indifference" violation under Farmer.

In this case, the Court of Appeals improperly limited the Farmer holding by condoning a federal officer's failure to implement any protective measures to protect an inmate because the officer was privy to information regarding the prisoner's mental health. This approval of the federal officer's conduct sent an axiomatic message to petitioner: a prisoner under psychiatric care should not and will not be taken seriously.

This message delivered in the unpublished opinion

of Court of Appeals below is not exclusive to petitioner herein. As long as this issue remains unresolved, all federal prisoners may reasonably be denied protection because they have past or present diagnosed mental disorders or psychiatric conditions.

In the proceedings below, petitioner alleged that respondent, a federal officer, failed to initiate protective action with deliberate indifference to his safety. According to this Court, prison officials have "a duty . . . to protect prisoners from violence at the hands of other prisoners." Farmer, supra, quoting Cortes-Quinones, supra, at 558.[6] The determination as to whether the prison official breached the duty with deliberate indifference is whether the official "[subjectively] knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, supra, at 833, 847. The subjective element, however, "does not mean that prison officials will be free to ignore obvious dangers to inmates." Id. at 826. Whether the official had the requisite knowledge "is a question of fact subject to demonstration in the usual ways . . . [circumstantial evidence], . . . and a fact finder may conclude that the official knew of a substantial risk from the very facts that it was obvious."

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[6] See Hudson v. Palmer 468 U.S. 517, 526-527 (1984)(prison officials must "take reasonable measures to guarantee the safety of inmates."). It has been long recognized that inmates have "demonstrated proclivities for antisocial criminal, and often violent, conduct." Farmer, supra, at 833, quoting Hudson v. Palmer (1984) 468 U.S. 517, 526. Inmates are then "stripped of virtually every means of self-protection and foreclosed their access to outside aid." Farmer, supra, at 833, citing Cf. DeShaney v. Winnebago County Dept. of Social Services (1989) 489 U.S. 189, 199-200. Under such conditions, government officials are "not free to let the state of nature take its course." Id.

Id. at 842, citing LaFave & Scott § 3.7, p. 335.

Liability for a federal officer's violation of the duty to protect an inmate may be imposed if the evidence shows that a prison official "merely refused to verify underlying facts that [she] strongly suspected to be true, or declined to confirm inferences of risk that [she] strongly suspected to exist." Farmer , supra, at 843, n. 8. On this basis alone, the Court of Appeals erred in declaring that respondent's reliance upon diagnoses of the prisoner's mental health cannot undermine the legitimacy of a prisoner's report that he is in danger in a correctional institution UNLESS, at the very least, the officer has also taken measures to investigate and abate the risk irrespective of the prisoner's diagnoses. Concluding that the prisoner is not in danger because the prisoner is diagnosed with psychosis and paranoia is insufficient to dispel the officers' duty under Farmer. The Court of Appeals decision to the contrary virtually eliminated prong two of the Farmer "deliberate indifference" test.

The record below demonstrates that respondent knew that petitioner faced a risk of serious harm and disregarded the risk by failing to take reasonable measures to abate it. See Farmer, supra, at 833, 847. Petitioner told respondent that a group of inmates threatened him to the extent that he sought assistance from a large friend, also an inmate, to "back down" the threatening inmates from a physical confrontation. (App. C, 26a, 27a; App. D, 28a, 30a, 31a). Petitioner was afraid and had reason to be afraid. The inmates threatening him had been in FCI Dublin, a temporary holding facility, for 3 to 5 years. (App. C, 23a, 24a). The threatening inmates "hung out together" and "had a power structure in the institution because they had been there that long." Id. They were the "shot callers" who dictated what was appropriate or inappropriate, quickly putting an inmate who challenged this structure "in his place." (App. C, 24a). Moreover,

one of the inmates was a known leader of a "particularly vicious gang." (App. C, 24a, 25a).

Respondent testified at her deposition that she would have decided that petitioner was in physical danger, "if he told [her] he was in danger and needed [her] assistance." (App. D, 31a). Petitioner testified at his deposition that he did tell respondent inmate Chow threatened him and he was fearful he would be physically or sexually abused. (App. C, 26a, 27a; App. D, 28a, 30a, 31a). Respondent admitted at her deposition that petitioner told her these inmates had threatened him and that he was afraid of these inmates and that she believed the inmates might hurt him. (App. D, 30a. 31a). Despite her admitted recognition that petitioner was in danger, respondent concluded that there was no actual risk because of petitioner's own history of mental health diagnoses. Thus, because of petitioner's own mental health history, when petitioner asked respondent for help, she did nothing.

Perhaps more disconcerting is that respondent failed to take any steps to investigate or abate the risk, relying wholly upon petitioner's mental health history to cast aside a report of what proved to be a imminent danger. The record below shows that information regarding an inmate's propensity for violence and history of violent behavior is available to respondent, yet she failed to initiate any investigation. (App. D, 28a, 29a). The record below likewise demonstrates that there are multiple options available to prison officials to ensure the protection of a prisoner and respondent wholly failed to implement these options or, at the very least, inform petitioner that the options were available. (App A, 7a; App. D, 29a).

Despite the evidence presented below in support of respondent's reasonable belief that the petitioner was indeed in danger, including her own admissions,

respondent relied upon psychiatric diagnoses to justify her failure to adhere to her duty as a federal officer to protect him. In other words, because petitioner suffers from psychotic paranoia, his fears lacked credibility and he was not entitled to protection.[7] Respondent's reliance upon petitioner's psychological diagnoses does not reasonably support the conclusion that petitioner's reported fears were not legitimate. Moreover, respondent testified that she believed petitioner was in danger. (App. D, 30a. 31a).

Her duty as a federal officer mandated implementing measures to protect him from danger. Yet, the Court of Appeals condoned this conduct by holding that she reasonably concluded petitioner was not at risk on the basis of his mental health diagnoses.

Petitioner is a federal inmate and cannot protect himself from other inmates without help. He is held captive when confronted with a threat of imminent violence, he has nowhere else to turn except to the federal officers employed at the institution for the purpose of maintaining the safety and protection of the inmates, as well as the institution itself. Petitioner went to respondent for help because she was a federal officer mandated with the duty to protect him. The Constitution required respondent to heed petitioner's request for help and the Court of Appeals erroneously held that respondent did not have to help, effectively holding that a man with his mental health history should not be taken seriously.

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In the proceedings below, petitioner offered the sworn declaration of Terry Allen Kupers, Ph.D., an expert on prison psychology, who stated that petitioner's "psychiatric diagnoses do not serve to discount or undermine the legitimacy of his report that he is in danger in a correctional institution."

II. QUESTION PRESENTED NO. 2

The decision below, denying petitioner's claim under the Federal Tort Claims Act, conflicts with decisions of this Court and all circuit courts holding that state law is applicable in an action under the Federal Tort Claims Act to recover for injuries sustained as a federal prisoner caused by negligent acts of a federal officer.

Pursuant to Title 28 U.S.C. § 2674, et seq, the Federal Tort Claims Act, an individual may assert a claim against the federal government for the negligent acts or omissions of its employees when the employee would be liable under state law. 28 U.S.C. § 2674, et seq.; 28 U.S.C. § 1346(b). A federal prisoner can sue under the FTCA to recover damages from the United States for personal injuries sustained during confinement in a federal prison and resulting from the negligence of a government employee. United States v. Menez (1963) 374 U.S. 150.

The general principle that the tort liability of the United States, in actions under the Federal Tort Claims Act, is governed by the law of the state where the tortious conduct took place is well settled.[8] The threshold issue in

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[8] U.S. SUPREME COURT: Massachusetts Bonding & Ins. Co. v. United States (1956) 352 US 128; FIRST CIRCUIT Porto Rico Gas & Coke Co. v Frank Rullan & Associates, Inc. (1951, CA1st Puerto Rico) 189 F.2d 397; SECOND CIRCUIT Murphy v. United States (1953, DC NY) 113 F. Supp. 345; THIRD CIRCUIT Eastern Air Lines, Inc. v. United States (1952), DC Del) 110 F. Supp. 491, affd per curiam (CA 3d) 207 F. 2d 560; FOURTH CIRCUIT Zaccari v. United States (1955, DC Md) 130 F. Supp. 50; FIFTH CIRCUIT Hall v. United States (1955, DC La) 136 F. Supp 187, affd per curiam (CA 5th 234 F. 2d 811; SIXTH CIRCUIT Potts v. United States (1948, DC Ky) 78 F. Supp. 833; SEVENTH CIRCUIT Stewart v. United States (1951, CA7th Ill) 186 F. 2d 627, cert den 341 US 940; EIGHTH CIRCUIT Hopson v. United States (1956, DC Cal)

any negligence analysis is the determination of whether or not there is a duty. The government's duty of care in situations giving rise to tort claims is that which is established by state law.[9]

Despite the controlling authority in all federal circuits, including the Ninth Circuit Court of Appeals, as well as the U. S. Supreme Court, the appellate court below devoted only three sentences to its discussion of petitioner's claim under the FTCA and held that "[f]or the reasons discussed above, Young Miller breached no duty to her patient." In so holding, the Court of Appeals erroneously applied the constitutional "deliberate indifference" standard to determine the existence of a duty for a negligence cause of action and refused to undertake an application of state law negligence principles to Respondent's conduct. Not only did the

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140 F. Supp. 591; NINTH CIRCUIT Kunkel v. United States (1956, DC Cal) 140 F. Supp 591; TENTH CIRCUIT Carnes v. United States (1951, CA10th NM) 186 F. 2d 448; DISTRICT OF COLUMBIA CIRCUIT United States v. Morow (1950 87 App. DC 84, 182 F. 2d 986.

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Cases representative of such a holding are: SECOND CIRCUIT McMullan v. United States (1947, DC NY) 75 F. Supp 164; THIRD CIRCUIT Eastern Air Lines, Inc. v. United States (1952, DC Del) 110 F. Supp. 491, affd per curiam (CA 3d 207 F. 2d 560; FOURTH CIRCUIT Comstock v. United States (1953, DC Md) 114 F. Supp 632; FIFTH CIRCUIT Burton v. United States (1950, DC Ala) 90 F. Supp. 957; SIXTH CIRCUIT Meara v. United States (1954, DC Ky) 119 F. Supp. 662; SEVENTH CIRCUIT Stewart v. United States (1951, CA 7th Ill.) 186 F. 2d 627; EIGHTH CIRCUIT Van Wie v. United States (1948 DC Iowa) 77 F. Supp 22; NINTH CIRCUIT Clark v. United States (1952, DC Or) 109 F. Supp. 213, affd (CA9th) 218 F. 2d 446; TENTH Ford v. United States (1952), CA10th Okla) 200 F. 2d 272.

Court of Appeals apply the constitutional "deliberate indifference" test to petitioner's negligence cause of action, but the court virtually ignored the petitioner's argument regarding the district court decision on this issue.

Unlike the more stringent standard of care applied to determine duty in the constitutional realm, discussed *supra*, under California law, a plaintiff must merely show that the defendant owed a duty to the plaintiff to use ordinary care. Nally v. Grace Community Church (1988) 47 Cal.3d 278. In addition to the general duty to use ordinary care, a person may have a duty to act affirmatively to warn or protect others or to control the conduct of others, if a special relationship exists between the actor and the person to be controlled or the person who needs protection. Peterson v. San Francisco Community College Dist. (1984) 36 Cal.3d 799; Kockelman v. Segal (1998) 61 Cal.App.4th 491, 498-499, citing Williams v. State of California (1983) 34 Cal.3d 18, 23 (emphasis added).

A special relationship "is typically where the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare." Peterson, supra, at 499, citing Prosser & Keeton, Torts (5th ed.1984) section 56, p. 374. Clearly, prisoners, including Swan, are in a position of vulnerability and dependent upon the federal officers to ensure their welfare. Equally clear is the ability of a federal officer, including respondent, to exercise control over a prisoner's welfare. Prisoners do not have the luxury enjoyed by a citizen in a free society to seek the help of outside law enforcement or court intervention when faced with a threat of imminent danger. Prisoners do not have access to self-defense weapons. Federal officers, however, have the resources at their disposal to ensure a prisoner's protection. In fact, it is the duty as a federal officer to

maintain the security of the institution, which necessarily includes protection of the inmates.

A perusal of California legal authority clearly supports that Respondent had a duty to protect Eugene Swan. For example, a psychiatric professional who knows of facts from which they could reasonably conclude that the patient would be likely to harm himself in the absence of preclusive measures must use reasonable care to prevent the harm. Meier v. Ross General Hospital (1968) 69 Cal.2d 420. Analogous reasoning is likewise found in California case law regarding special relationships between a school district and students. California courts have established that a school district has a duty to take all reasonable steps to protect its students from the harmful acts of third parties. Leger v. Stockton Unified School Dist. (1988) 202 Cal.App.3d 1448. See also Rest.2d Torts, section 319 ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."). As such, the California Supreme Court and appellate courts have clearly established that a special relationship entails that the person charged with control of the relationship must provide protection to the person under her control.[10]

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[10] Decisions in other states similarly support the assertion that the duty of care owed by a prison official to prisoners in their charge is the duty of reasonable care. See Upchurch v. State (1969) 51 Hawaii 150 (The standard of care owed by prison officials to a prisoner assaulted by fellow inmates is that of "ordinary care"; judgment for plaintiff prisoner reversed on other grounds.); Lamb v. Clark (1940) 282 Ky 167 (It is the duty of the jailer to exercise ordinary care to safely keep the prisoner and to prevent unlawful injury to him while in the jailer's custody and if the jailer failed to exercise ordinary care by allowing other prisoners to strike and

Here, respondent was in a special relationship with both the petitioner and the perpetrator of the assault. As such, she had a duty of care to control the conduct of the third person perpetrator of the assault, as well as a duty of care to give petitioner protection.

The Court of Appeals' blatant departure from uncontroverted authority that the government's duty of care in situations giving rise to tort claims is that which is established by state law warrants resolution by this Court.

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bruise the plaintiff, the jury should find for the plaintiff.); Wilson v. State, 36 App. Div. 2d 559 (In an action against the state for personal injuries sustained by a prisoner when attacked by a fellow inmate, based on alleged negligence in the state failing to segregate or supervise the prisoner properly known to have dangerous propensities, the state's duty is measured by risks reasonably to be foreseen.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 29, 2002 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-15847

EUGENE OLIVER SWAN, JR., Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA and LINDA YOUNG MILLER, PH.D.,

On Appeal from the United States District Court for the Northern District of California Martin J. Jenkins, District Judge, Presiding.

Before Noonan and Trott, Circuit Judges and Ezra, District Judge

Submitted January 14, 2002, San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

*** The Honorable David Alan Ezra, Chief United States District Judge for the District of Hawaii, sitting by designation.

Federal prisoner Eugene Oliver Swan, Jr. ("Swan"), appeals from the district court's summary

judgment in his suit under Bivens, and the Federal Tort Claims Act, alleging violation of the Eighth Amendment which allegedly resulted from the deliberate indifference by federal officers to Swan's safety and health. Swan's left eye was split open in a violent attack and beating by an inmate and had to be surgically removed. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's grant of summary judgment.

Swan asserts that the United States of America and Linda Young-Miller ("Defendants") violated his rights, and are therefore responsible for his injury, because Defendants should have acted to prevent the assault, based on information Swan had previously conveyed to Dr. Young Miller.

The Standard of review of district court's grant of summary judgment is de novo. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (per curiam).

The test for determining whether an official can be shielded by qualified immunity is two-fold. The court must consider whether (1) "the law governing the conduct was clearly established," and if so, whether (2) "under that law, a reasonable official could have believed his conduct was lawful." Thompson v. Souza, 111 F.3d 694, 698 (9th Cir. 1997).

Given the facts of this case, Young-Miller could reasonably have believed that her discretionary conduct vis a' vis Swan's communications was lawful. Young-Miller did concede that it was a possibility that the inmates might harm Swan, however, her complete testimony indicates she did not believe there was any serious threat of physical

danger at all. Young-Miller had grounds to believe that Swan was not in danger. Young-Miller was treating Swan for symptoms of psychosis and depression, she had diagnosed him as paranoid, and had learned of his history of physical abuse and sexual abuse and intimidation. Given these diagnoses, Young-Miller reasonably concluded that the confrontation with the other inmates did not pose an actual risk that Swan would come to physical harm, but rather had caused him to relive his negative past experiences. These conclusions were later supported by Swan himself on December 8, 1998, just a few days after he first told Young-Miller of the confrontation, and before any attack or injury occurred, when he described himself as "paranoid" and stated that his fears could have been misplaced.

At the second meeting, Swan displayed a concern that Young-Miller not tell anyone about his situation. Given the general aura of confidentiality surrounding this situation, that Young Miller respected Swan's wishes does not evince "deliberate indifference." Without any indicia of deliberate indifference, a prison official does not possess a sufficiently culpable state of mind to be held liable for an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825, 834 (1994). Accordingly, Young-Miller's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person could have known" and she is protected from liability for civil damages by qualified immunity Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Swan also alleges that the United States is liable under the FTCA because Young-Miller was negligent in failing to take any action after Swan told her of his confrontation with the threatening inmates. For the

reasons discussed above, Young-Miller breached no duty to her patient. Accordingly, no negligence claim can be maintained and Swan's FTCA claim also fails.

The district court's grant of summary judgment on both grounds was appropriate.

Affirmed.

A true copy attest:
Clerk of Court. Cathy Catterson

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. c 99-5401 MJJ

EUGENE OLIVER SWAN, JR., Plaintiff
v.
UNITED STATES OF AMERICA and LINDA YOUNG MILLER, PH.D., Defendants.

Order Granting Defendants United States of America and Linda Young-Miller, Ph.D.'s Motion for Summary Judgment

Before the Court is defendants United States of American and Linda Young-Miller, Ph.D.'s ("Young-Miller") motion for summary judgment. The defendants contend that plaintiff Eugene Oliver Swan's ("Swan") claim for violation of the Eight Amendment to the United States Constitution against Young-Miller fails because she is shielded from liability by the doctrine of qualified

immunity, and that Swan's negligence claim, brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 *et seq.*, against the United States fails because Young-Miller did not breach any standard of care.[1] For the reasons set forth below, the Court GRANTS defendants' motion.

FACTUAL BACKGROUND

Swan is an inmate serving a sentence for bank robbery and escape from federal custody. His claims in this action arise from an incident that occurred on December 24, 1998, while he was incarcerated at the Federal Corrections Institute in Dublin, California ("FCI Dublin"). On that date, Swan was attacked by another inmate and suffered in injury which required the surgical removal of his left eye. Swan contends that prior to the attack he provided information to prison officials, specifically Young-Miller, which should have put the defendants on notice of an impending assault. Their subsequent failure to prevent the attack, Swan claims, violated his rights and thereby renders the defendants responsible for his injury.

Young-Miller is a staff psychologist at FCI Dublin who provided counseling to Swan from September 1997 through December 1997 and again from June 1998 through February 1999. This counseling involved crisis

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1Swan's First Amended Complaint brings numerous claims against a multitude of defendants. However, before this motion for summary judgment was filed as well as during the pendency of the motion, Swan dismissed all defendants other than the United States and Young-Miller and dismissed all causes of action except those based on the Eight Amendment and the FTCA.

prevention through individual and group psychotherapy, and focused on the prevention of self-harm and suicide by Swan and on the management of his symptoms of psychosis and depression. According to Swan, he and Young-Miller developed an open and honest relationship, and thus, during his counseling sessions with Young-Miller, he felt comfortable discussing his mental and emotional well-being, his prior sexual abuse and intimidation as an inmate and his history of physical abuse. On one occasion, Young-Miller employed her knowledge of Swan's prior experiences to avert his transfer from FCI Dublin to a facility in Lompoc, California. Having been told by Swan that he had been sexually assaulted by another inmate during his incarceration at the Lompoc facility, Young-Miller requested that Swan not be designated for transfer.

On December 3, 1998, Swan requested an emergency session with Young-Miller. At that session, Swan informed Young-Miller that he had been confronted and intimidated by a group of inmates. The confrontation involved inmate Raymond Chow's ("Chow") demand that Swan allow Chow's cellmate to move into Swan's cell. When Swan told Chow that he did not want a cellmate, Chow threatened Swan, telling him that he "had better take this guy out of his cell, because if [he] didn't, [Swan] would be disrespecting him." *See* Swan Deposition ("Depo"), 45:19-25; 46:1-3. Swan related to Young-Miller that he had enlisted the assistance of a large friend in order to back down the threatening inmates. He also explained to Young-Miller that he "was afraid like when [he} was in reform school, when [he] had been physically and sexually abused, and that [he] had those same type of fears of happening here." *Id.* at 105:14-17. Swan further testified that he specifically remembers saying that he

needed help; according to Swan, Young-Miller "asked me what should I do, or what do you want me to do," and he said "I don't know[,] I just need help." *See id.* at 105:3-11.[2]

At her deposition, Young-miller conceded that she "guess[ed] it did occur to [her] as a possibility" that the group of inmates might hurt Swan, but that "once entertaining that though, [she] did not feel concerned that they would." *See* Young-Miller Depo., 27:8-12. Had Young-Miller believed that violence against Swan was likely, she could have pursued several measures intended to protect inmates, including placing Swan in protective custody, moving Swan to another unit at FCI Dublin, or moving on of the threatening inmates away from Swan. Alternatively, she could have kept Swan's December 3, 1998 disclosures confidential, but informed Swan of the protective measures that were potentially available to him. Young-Miller did not follow either of these courses of action. She "didn't seriously think [Swan] was in physical

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2 Swan's purported request for help was disclosed in the context of the following deposition testimony: Q: Do you remember Dr. Young-Miller's response? A: She asked me if what had happened, and I told her, and she responded by saying do you want me to do something.. Q: Do you have a specific- your squinting, so do you have a specific memory of her saying that to you? A: She asked me what I should do, or what do you want me to do. I said I don't know. I just need help. Q: Do you have a specific memory of saying that you needed help? A: Yes. Q: And what did she respond? A: She asked me what she wanted me do, and I just said I don't know. Q: What happened after that, after you told her you didn't know what she should do? A: I just – I continued to tell her that I was afraid like when I was in reform school, when I had been physically and sexually abused, and that I had those same types of fears of happening here.

danger," *see* Young-Miller Depo., 28:20-3, but instead concluded that the intimidation from the group of inmates had caused Swan to relive childhood traumas. *See* Young-Miller Declaration ("Decl."), ¶7. She therefore did not inform Swan of the available protective measures, did not tell anyone about his confrontation with the other inmates, and did not take any other action in response to Swan's December 3, 1998 disclosures.

Various facts purportedly support Young-Miller's conclusion that Swan was not in immediate danger, as well as her decision to keep the session confidential. At some point in December 1998, Swan told Young-Miller that inmates spoke in pejorative terms about inmates like Swan who received treatment from the FCI Dublin psychology staff, yet he never stated a believe that those insults would escalate into violence against him. Furthermore, during the December 3, 1998, counseling session, Swan did not expressly ask for any kind of protection from other inmates. He did not ask Young-Miller to place him in protective custody, he did not ask for a change in his housing situation, such as being moved to another unit at FCI Dublin, nor did he ask that another inmate be moved away from him. Swan also failed to make any of the above-mentioned requests to the Administrator of FCI Dublin who was in the same room as Swan and Young-Miller during the December 3, 1998 session (but who was not privy to their conversation). Swan's statements following the December 3, 1998 session further indicate that his fears of being harmed had subsided and that he wished to keep confidential his disclosures regarding his confrontation with the threatening inmates. During his regularly scheduled appointment with Young-Miller on December 8, 1998, Swan indicated that he did not want her to disclose such

information for fear of being labeled a "snitch," and asked Young-Miller: "You didn't tell anyone did you?" *See* Young-Miller Decl., ¶ 8. Furthermore, he diagnosed himself as being "paranoid" and stated that his fears regarding the confrontation could have been misplaced. *See id.* At his December 16, 1998 and December 21, 1998 sessions with Young-Miller, Swan did not report any fear of danger or any intimidation from another inmate, nor did he request that any protective action be taken by the FCI Dublin staff.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). The moving party has the initial burden of proving that there is no genuine issue of material fact. That burden may be discharged by showing that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). To withstand summary judgment, the opposing party must set forth, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue of material fact in dispute. *See* Fed.R.Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law."

Celotex, 477 U.S. at 323. The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing *Matshita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980)

Analysis

I. Young-Miller's Qualified Immunity from Swan's Eighth Amendment Claim

The defense of qualified immunity protects "government officials ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This rule "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed, 500 U.S.* 478, 494-95 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Therefore, regardless of whether or not a constitutional violation occurred, the official should prevail if the right asserted by the plaintiff was not clearly established or the official could have reasonably believed that his or her particular conduct was lawful. *Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991). "The entitlement is an immunity from suit rather than a mere defense to liability; ... it is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985); *see also hunter v. Bryant,* 502 U.S. 224 (1991) (per curiam).

A court considering a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all. *See Wilson v. Layne,* 119 S. ct. 1692, 1694 (1999); *Conn v. Gabbert,* 526 U.S. 286, 290 (1999). The qualified immunity analysis then becomes a two-part test: (1) Was the law governing the official's conduct clearly established? and, (2) if so, under the law, could a reasonable official have believed his conduct was lawful? *See Act Up!/Portland v. Bagley,* 988 F.2d 868, 871-72 (9th Cir. 1993). The plaintiff bears the burden of proving the existence of a "clearly established" right at the time of the allegedly impermissible conduct. *See Marazitti v. First Interstate Bank,* 953 F.2d 520 (9th Cir. 192). If the plaintiff meets this burden, then the defendant bears the burden of establishing that his actions were reasonable, even if he violated the plaintiff's constitutional rights. *See Doe v. Petaluma City School District.,* 54 F.3d 1447, 1450 (9th Cir. 1995); *Marazitti,* 953 F.2d at 523.

There is no dispute that Swan has alleged the deprivation of an actual constitutional right through his claim for violation of the Eighth Amendment. As a general matter, a plaintiff may seek damages for constitutional violations that cause injury to the plaintiff as a result of a federal officer's conduct. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The United States Supreme Court has further held that an inmate may name a federal officer in an individual capacity, as a defendant in alleging an

Eighth Amendment constitutional violation pursuant to *Bivens*. *See Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 977 (1976).

Having established that Swan alleges a valid cause of action, the Court must next determine whether the law surrounding his allegations was clearly established at the time the alleged constitutional violations occurred. *See ActUp!/Portland v. Bagley*, 988 F.2d at 873 (determination of whether the law was clearly established is an issue of law for the Court to decide.) A right is clearly established when its contours are sufficiently clear so that a reasonable official would realize that what he or she is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This does not mean that there has to be a case on point holding that the officials' exact conduct is illegal, however, "in the light of preexisting law the lawfulness must be apparent." *Id.* at 640.

In 1994, several years prior to the events at issue in this case, the United States Supreme Court established the basic standard for an alleged Eighth Amendment violation, holding that "a prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Whether or not a prison official acted with "deliberate indifference" is determined under a subjective, rather than objective, test wherein "a prison official cannot be found liable under the Eight Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. The official must not only be aware of facts from which the inference could be drawn that a

substantial risk of serious harm exists, he or she must also draw such an inference. *Id.* In light of this specific guidance from the Supreme Court, it is apparent that the relevant law was clearly established in 1998 when Swan was attacked by another inmate.

Accordingly, the Court must resolve the second part of the qualified immunity test: whether the facts could support a reasonable believe that the conduct at issue was lawful.[3] In this case, the Court must decide if a reasonable official who possessed the same knowledge of the surrounding facts that Young-Miller possessed would have believed that her course of conduce was lawful under the legal standards set forth in *Farmer*? Put another way, could Young-Miller have reasonably believed that her failure to take affirmative steps to protect Swan was lawful under Farmer's deliberate indifference standard?

A plaintiff may make the factual showing that a

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3 The Ninth Circuit has recognized that a "tension" may exist between the qualified immunity standard's emphasis on objective reasonableness and claims in which the clearly established law at issue contains a subjective element, such as in this case where the deliberate indifference standard governs Swan's alleged Eighth Amendment violation. *See Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir. 1991) ("*Branch I*"), reaffirmed in *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994) (citations and footnote omitted.) However, in *Branch I*, the Ninth Circuit approvingly noted that a number of circuits have held that courts are not precluded from considering subjective factors (unrelated to knowledge of the law) in assessing a defendant's entitlement to qualified immunity, and, to account for any resulting "tension," adopted a heightened pleading standard for constitutional torts having subjective elements. *See id.* at 1385-86.

prison official had the requisite knowledge of a substantial risk "in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842 (internal citations omitted). Thus, "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* Nevertheless, "the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him." *Id.* at 843 n.8. "Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." *Id.* At 844. "In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844. In any event, turning a blind eye to the relevant surrounding facts will not shield a prison official from liability. "[I]f the evidence show[s] that [a prison official] merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation ...)," liability may be imposed. *Id.* at 843 n.8.

In this case, Young-Miller could have reasonably believed that her failure to take affirmative steps to protect Swan was lawful because a reasonable official, having the

same knowledge of the surrounding facts as Young-Miller, could have believed that no excessive risk to Swan's health or safety existed under the circumstances. On December 3, 1998, Young-miller learned of Swan's confrontation with the other inmate and heard his admission that he was afraid. This information did not surface in a vacuum; rather, Young-Miller was able to place theses facts within the context of Swan's therapeutic history and the disclosures he had made to Young-Miller during their long standing counseling relationship. Young-Miller was treating Swan for symptoms of psychosis and depression, and through his treatment, learned of Swan's history of physical abuse and his prior sexual abuse and intimidation as an inmate. Indeed, at the December 3, 1998 counseling session, Swan himself connected his fears from the threatening confrontation with his childhood experiences at reform school, where he had been physically and sexually abused. *See* Swan Depo., 105:14-17. Young-Miller reasonably concluded that the confrontation with the other inmates did not pose an actual risk that Swan would come to physical harm, but rather had caused him to relive his negative past experiences and thus request counseling from his therapist. This conclusion was later supported by Swan himself on December 8, 1998, just a few days after the first told Young-Miller of the confrontation, when he described himself as "paranoid" and explained to Young-Miller his belief that his fears could have been misplaced. *See* Young-Miller Decl., ¶8.

Swan's failure to request preventive measures by prison officials further indicated that there was no excessive risk to Swan's health or safety. In December 1998, prior to his attack, Swan told Young-Miller that other inmates had harassed him because he received treatment from the FCI Dublin psychology staff, yet he did

not express a belief that such harassment would lead to violence or ask for protection from the harassing inmates. Likewise, Swan never asked that specific preventive measures be taken to protect him from physical harm arising from his confrontation with the threatening inmates led by Chow, despite the fact that he met with Young-Miller four times between the confrontation and the December 24, 1998 attack. Swan did state to Young-Miller on December 3, 1998 that he needed help. However, that plea becomes somewhat ambiguous when examined in the context of the deposition testimony from which it derives. When Young-Miller asked Swan what he wanted her to do, he said he did not know, he "just need[ed] help." Young-Miller's response was to again ask Swan what he wanted her to do. Swan again said he did not know and then he proceeded to explain to Young-Miller that he was afraid like when he was in reform school. Three reasonable interpretations of this conversation are plausible. First, Swan may have intended to request that Young-Miller take some action to protect him, but he did not know what from such action should take. Second, Swan may have expressed a need for help, but when asked to specify the assistance he desired, he vacillated and became unsure as to whether he actually wanted any assistance. Third, when Swan asked for help, he may have been asking Young-Miller for psychological assistance in dealing with the childhood fears that had resurfaced as a result of the confrontation and Swan's history of sexual and physical abuse. Given the possible meanings of Swan's plea for help, a reasonable prison official could have properly concluded that Swan was not in fact requesting to be protected by prison staff, and thus, the prison official could have believed that not taking further action was lawful under the circumstances. Swan's subsequent failure to report any fear of danger or

intimidation and failure to request any assistance at his December 8, 1998, December 16, 1998, or December 21, 1998 counseling sessions likely confirmed Young-Miller's conclusion that Swan did not desire protection, and, by reasonable implication, her opinion that Swan did not believe he was in physical danger.

Finally, Young-Miller's decision not to pursue protective action was motivated not by an indifference to Swan's situation, but by her desire to preserve the confidentiality of Swan's disclosures. As described in the next section of this Order, California law protects the confidentiality of communications between psychotherapists and patients. While psychologists are required to disclose information regarding dangers that patients pose *to themselves or to others,* California law does not require disclosure where the danger is posed *to the patient from a third party.* Rather, a psychologist may disclose, *but is not obligated* to disclose such information. Thus, when Swan informed Young-Miller that he had been threatened by someone else, Young-Miller was not required to breach the confidentiality of her patient-psychotherapist communications with Swan. With regard to the issue of qualified immunity, Young-Miller could have reasonably believed that her decision to maintain the confidentiality of Swan's December 1998 disclosures properly complied with the law. Moreover, Swan later confirmed that Young-Miller's decision corresponded to his expectations regarding confidentiality when, at his December 8, 1998 session, he verified that she had not told anyone about his confrontation with the other inmates by asking her, "You didn't tell anyone, did you?" *See* Young-Miller Decl., ¶8.

Not only was a risk to Swan not obvious in this

case, the undisputed facts also demonstrate that Young-Miller, or another prison official in her shoes, could have reasonably determined that no excessive risk to Swan's health or safety existed under the circumstances. Young-Miller's assessment of the situation did not amount to deliberate indifference to Swan's predicament, nor did she know of but disregard a substantial risk that Swan would suffer serious harm. To the contrary, she considered the surrounding facts and concluded that "the risk to which the facts gave rise was insubstantial or nonexistent." *Farmer*, 511 U.S. at 844. The facts reveal that a reasonable prison official in Young-Miller's position would have similarly concluded that Swan's fears, while credible, did not place him in danger of serious harm.[4] Consequently, Young-Miller is entitled to qualified immunity from Swan's claim for violation of the Eighth Amendment.

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4 Swan makes much of the fact that Young-Miller failed to take any affirmative steps to protect him. In addition to not seeking official prison action on behalf of Swan, such as protective custody or transfer, Young-Miller also declined to advise Swan of his possible options and failed to investigate the criminal and psychological background of Chow, the inmate who threatened Swan in late 1998. Nevertheless, the applicable legal standard does not require any such action where the prison official reasonably believes that no excessive risk to the inmate's health or safety exists under the surrounding circumstances. In the absence of such a risk, special protective steps are arguably unnecessary. Here, Young-Miller reasonably determined that no excessive risk was posed to Swan's physical safety, and that continued psychological counseling was the appropriate response to Swan's situation. Since a prison official could have reasonably believed that these determinations complied with the law, Young-Miller was not obligated to take any additional action in this case.

II. Federal Tort Claims Act

The defendants also seek summary judgment in their favor on Swan's FTCA claim. According to Swan, the United States is liable under the FTCA because Young-Miller was negligent in failing to take any action after Swan told her of his ;confrontation with the threatening inmates. The defendants, however, contend that Young-Miller's duty as a psychotherapist to keep Swan's communications confidential excused her from disclosing information regarding the confrontation, and thus, the defendants argue that Young-Miller's actions satisfied the duty of care she owed to Swan.

The FTCA waives the sovereign immunity of the United States for claims based on the negligent or wrongful acts of United States employees. 28 U.S.C. §1346. Under the FTCA, the government's liability is determined "in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. §2674; *Kangley v. United States*, 788 F.2d 533 (9th Cir. 1986). Because plaintiff's accident occurred in California, this action is governed by California law. 28 U.S.C. §1346(b); *Yanez v. United States*, 63 F.3d 870 (9th Cir. 1995).

California law provides a broad rule of privilege to protect confidential communications between patient and psychotherapist. *See* Cal. Evid. Code §1014(a). Under this privilege, psychotherapists are required to maintain the confidentiality of their communications with patients. There are, however, several exceptions to this obligation. Since the patient holds the precluding the disclosure of confidential communications, he or she may waive the privilege through his or her own disclosure of a significant

part of the communication or by consenting, through words or actions, to such a disclosure by someone else. *See* Cal. Evid. Code §912. Similarly, California law precludes psychotherapists from claiming the privilege of refusing to disclose confidential communications when their patients instruct them not to do so. *See* Cal. Evid. Code §1014(c). California statutory and decisional law recognizes another exception to the privilege by imposing a duty on psychotherapists to disclose confidential patient communications when there is a "reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." Cal. Evid. Code §1024; *Tarasoff v. The Regents of the University of California,* 17 Cal.3d 425, 442 (1976). As explained by the California Supreme Court, "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others." *Tarasoff,* 17 Cal. 3d at 442. Therefore, "[t]he protective privilege ends where the public peril begins." *Id.*

The situation in this case is not directly addressed by the above-described psychotherapist-patient privilege or its exceptions. Here, Swan's communications to Young-Miller did not disclose any risk that Swan would harm himself or that Swan posed a danger to others. Instead, the confrontation that Swan described to Young-Miller on December 3, 1998 involved the possibility that Swan might be harmed by a third party. California law has not imposed a duty on psychotherapists whereby they must violate the confidentiality of patient communications in order to protect a patient *from a third party.* Although a

psychotherapist *may* reveal communications regarding a risk of harm to a patient from another person, they are not *obligated* to make such disclosures. *See. e.g.* Cal. Evid. Code §912 (patient may consent to waiver of the privilege); Cal Evid. Code §1014 (psychotherapists may not claim the privilege to refuse to disclose confidential patient communications "if he or she is otherwise instructed by a person authorized to permit disclosure"); *see* also Young Miller Decl., ¶2; American Psychological Assoc., *Ethical Principles of Psychologists and Code of Conduct §5.05* (1992) ("Psychologists disclose confidential information without the consent of the individual *only as mandated by law or where permitted by law* for a valid purpose, such as ... to protect the patient or client or others from harm ...") (emphasis added). Consequently, Young-Miller was under no legal duty to disclose Swan's confidential communications. *See Benavidas v. San Jose Police Dep't.* 71 Cal.App.4th 853, 859 (1999) ("The existence of a duty is a question of law."); *Dutton v. City of Pacifica,* 35 Cal.App.4th 1171, 1175 (1995). Moreover, since notifying prison officials of a possible risk of harm to Swan or pursuing protective measures on behalf of Swan would have necessarily involved the disclosure of Swan's counseling-session statements, Young-Miller did not breach a duty owed to Swan's disclosures or take action in response to his confidential communications, there can be no negligence cause of action based on Young-Miller's conduct. *Cf. Benavidas,* 71 Cal.App.4th at 868 ("without a duty, no negligence cause of action can be stated"). Swan's FTCA claim therefore fails as a matter of law.

CONCLUSION

Young-Miller is entitled to qualified immunity from

Swan's claim for violation of the Eighth Amendment. The undisputed facts in this case establish that Young-Miller, or another prison official possessing the same knowledge of the surrounding facts that Young-Miller possessed, could have reasonably believed that the conduct at issue was lawful under governing legal standards. Young-miller did not exhibit deliberate indifference to a substantial risk of serious harm to Swan. Instead, she reasonably determined that no excessive risk to Swan's health or safety existed under the circumstances. Therefore, qualified immunity applies to Young-miller and summary judgment in favor of the defendants is warranted on this cause of action.

In addition, summary judgment is also proper with respect to Swan's claim under the FTCA. Young-Miller did not breach any duty of care owed to Swan when she maintained the confidentiality of his counseling-session communications. Since the information Young-Miller learned from Swan regarding his confrontation with the threatening inmates related to a risk of harm to Swan from a third party, and not a risk of harm from Swan to himself or to others, Young-miller was under no legal obligations to reveal Swan's disclosures or to take any other action which would require the disclosure of Swan's confidential communications.

Therefore, defendants United States of America and Linda Young-Miller, Ph.D.'s motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

DATED: March 20, 2001.
/S/MARTIN J. JENKINS, UNITED STATES DISTRICT JUDGE.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. c 99-5401 MJJ

EUGENE OLIVER SWAN, JR., Plaintiff
v.
UNITED STATES OF AMERICA and LINDA YOUNG MILLER, PH.D., Defendants.

DEPOSITION OF EUGENE O. SWAN

Phoenix, Arizona
December 18, 2000
9:20 o'clock a.m.

WHITE & ASSOCIATES
CERTIFIED COURT REPORTERS
932 South Stapley
Mesa, Arizona 85204
464-1035

PREPARED FOR: Mr. ERIC J. RATINOFF

BY: Karen C. Pack, RPR, Certified Court Reporter, No. 50246

Page 36, Lines 22-25:

Q: A minute ago I asked you if he ever threatened you, and that's when you told this story. Why is it you perceived that comment to be threatening?

A: Because Louis Torres had been in FCI Dublin

Page 37, Lines 1-21:

about five years, so had Raymond Chow, and Joseph Deterberville had been there two or three years. There's a few other inmates that I can't remember the names that had been there that long with them, and they basically had the power structure in the institution because they had been there that long.

And when somebody like myself that hadn't been there that long challenged them on what was on TV, or anything that came up, you were quickly put in your place because of the pecking order. And that's why I perceived it as a threat, because I had been put in my place by Chow and inmate Deterberville at different times during my stay in Dublin.

They all hung out together, and they were like what's called the shot callers in prison.

Q: Shot callers?

A: Shot callers. They were –

Q: Go ahead.

A: Excuse me. They were the ones that were dictating the other inmates what was appropriate and what was not appropriate.

Page 39, Lines 8-21:

Q: Were you aware of any of those three gentlemen harming anyone at any prison?

A: As far as Raymond Chow goes, I know he was connected to a gang, Chinese gang in San Francisco, and he was – he was one of the principal leaders, and I had been informed that it was a particularly vicious gang.

Q: Who had you been informed by?

A: Different inmates that knew Chow and that knew about the Triad in San Francisco.

Q: So you had been told that Chow was the head of a gang?

A: Yes.

Q: and, therefore, a pretty dangerous person?

A: Yes.

Page 40, Lines 11-25:

Q: Had Raymond Chow ever threatened you prior to the incident on December 24th?

A: Yes.

Q: How frequently?

A: A couple of times.

Q: When was the first time?

A: I believe that was in the TV room, also, and he basically just let me know that I was going to have problems with him if I continued to go against their authority, and he made a sexual innuendo at that point, too.

Q: What was the sexual innuendo?

Page 41, Lines 1-4:

A: He just kind of rotated his hips forward and said I'm going to get you, and tried to make it seem like he was joking. I didn't really take it as he was joking, but –

Page 45, Lines 19-25:

Q: BY MR. RUBIN: And you perceived those comments that Raymond Chow said to you that his cell mate, or possible cell mate, should be transferred to your cell as a threat?

A: Well, that's – yes.

Q: Why did you perceive it as a threat?

A: Because the way he said it was – he wasn't

Page 46, Lines 1-14:

asking. He was demanding. He said that I had better take this guy out of his cell, because if I didn't , I would be disrespecting him.

Q: Did you respond?

A: Stacy Miller, at that point, asked me what do you want to do, and I responded that I don't want him in my cell.

Q: You responded to Raymond Chow?

A: Yes.

Q: Is it Stacy Miller or Tracy Miller?

A: Stacy.

Q: And did anyone else say anything after you said you didn't want this person in your cell?

A: Raymond Chow said this isn't over.

Page 103, Lines 2 - 25:

Q: BY MR. RUBIN: What fears did you discuss with her regarding potentials for abuse while you were an inmate at FCI Dublin?

A: After the incident with Raymond Chow about trying to move someone into my cell, I had told her that I was fearful that I would be physically or sexually abused by him or other inmates.

Q: Did you tell Dr Young-Miller the specifics of what you told me earlier in terms of what Raymond Chow said to you regarding a cell mate?

A: Yes.

Q: Did you tell her essentially what you told me, in terms of the facts of what Raymond Chow said to you?

A: Yes. I told her that I was –

MR. RATINOFF: He just asked you a yes or a no question.

THE WITNESS: Yes.

Q: BY MR. RUBIN: What did you tell her about Raymond Chow?

A: That he had intimidated and threatened me.

Q: Did you tell her specifically what the threats were?

A: Yes.

Page 105, Lines 3 - 8:

A: She asked me what should I do, or what do you want me to do. I said I don't know. I just need help.

Q: Do you have a specific memory of saying that you needed help?

A: Yes.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. c 99-5401 MJJ

EUGENE OLIVER SWAN, JR., Plaintiff
v.
UNITED STATES OF AMERICA and LINDA YOUNG MILLER, PH.D., Defendants.

DEPOSITION OF LINDA YOUNG-MILLER
July 12, 2000

Reported by: Kathryn Davis, CSR No. 3808

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Page 18, Lines 23 - 26:

Q: At some point in your visits with Mr. Swan, he described to you that he was afraid of other inmates, right?

A: At some point in our contact?

Page 19, Lines 1 - 23:

Q: Yes.

A: Yes.

Q: And, in fact he identified somebody who he was particularly afraid of, right?

A: Well, that is a little bit strong language, I think. He mentioned a Mr. Chow one time, that Mr. Chow had done something that he found intimidating.

Q: Did you know who Raymond Chow was at the time?

A: I did not.

Q: Was that information available to you, if you asked somebody on the prison staff "who is Raymond Chow"?

A: Yes.

Q: Did you ever find out who Raymond Chow was?

A: I never found out about Raymond Chow, no.

Q: To this day, you don't have any idea who he was or what he was there for?

A: No.

Q: Whether he was a dangerous fellow or not?

A: I don't know. Actually, I may have checked

it informally just for my own curiosity, but I don't recall what the answer was. I didn't seek any professional evaluation of him.

Page 20, Lines 22-26:

Q: BY MR. CUTTER: What are the options that the prison officials have for dealing with an inmate who is under threat?

A: What are the options the administration has? They can lock the person in protective custody so no one

Page 21, Lines 1-12:

can assault them. They could move them to a different unit or institution. They could lock up the alleged perpetrator. Those are some options.

Q: How is the jail organized here? Are there separate areas in which the inmates don't interact with each other?

A: There is J-1 and J-2 units that are separated.

Q: Would that be another option to move an inmate from J-1 to J-2?

A: I think I mentioned that, a unit change.

Q: Unit change?

A: Uh-huh (affirmative).

Page 23, Lines 23 - 26:

Q: Well, looking at your notes from December 3rd, 1998, you typed, "Seen at his request via Mr. Thompson, FTC Administrator."

So that means that Mr. Swan had requested an

Page 24, Lines 1-24:

emergency session with you, right?

A: Yes.

Q: It wasn't a regularily-scheduled *[sic]* session?

A: Correct.

Q: The stated purpose of his statement, from your summarized note, is that a group of inmates tried to intimidate him, right?

[OBJECTIONS OMITTED]

Q: So he states a group of inmates tried to intimidate him in to trying to move him; is that correct?

A: Yes.

Q: When a group of inmates tries to intimidate a particular inmate, from your many years of work in the prison system, wouldn't it typically be physical intimidation that they are using?

A: The answer to that – I have not experienced a lot of occasions where there was physical or any kind of intimidation going on in the jail here.

Q: Specifically though, a group of inmates confronting another inmate, wouldn't you think that

Page 25, Lines 1-24:

to get at what was the main purpose of the session. I had some difficulty doing that. But he did say this, that he had been intimidated by a group of inmates.

Q: And the lead fact you chose to place in your typed summary of the visit with him was that a group of inmates tried to intimidate him, right?

A: Yes.

Q: Did it occur to you that this group of inmates, who was trying to intimidate Mr. Swan, might hurt him?

A: I guess it did occur to me as a possibility but I didn't think – I mean, once entertaining that thought, I did not feel concerned that they would.

He did say he had a large friend. I don't know if I wrote this in here. I guess I didn't. He'd had an inmate – he'd gone to get his friend, and that they were able to back these inmates down and the inmates backed down.

That to me was what he had said in that session, although I don't believe I wrote it here.

Q: So in addition to what you wrote in there, it was a situation where enough physical intimidation was involved that he felt they needed to seek assistance from a larger friend; is that correct?

A: That is what he said.

Page 28, Lines 18 -26:

Q: BY MR. CUTTER: Sure. Mr. Swan had described to you a scenario in which he was outnumbered by a group of inmates who were intimidating him.

A: Uh-huh (affirmative).

Q: And which his only recourse was to get a larger friend to assist him in backing them down from a physical confrontation.

A: Uh-huh (affirmative).

Q: What additional facts would he have had to have

Page 29, Lines 1-6:

given you for you to decide that he was in physical danger?

MR. RUBIN: Same objection.

Go ahead and answer.

THE WITNESS: If he told me he was in danger and he needed my assistance.